No. 89-375

In The

Supreme Court of the United States

October Term, 1989

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether Virginia's exemption of ordained ministers from posting a $500 bond to celebrate marriages violates the Establishment Clause or the Free Exercise Clause of the First Amendment?

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STATEMENT OF THE CASE

Petitioner Roy R. Torcaso ("Torcaso") is a member of the American Humanist Association ("AHA"), a non-profit educational and philosophical organization. The members of AHA generally do not hold any religious beliefs. Members looking for guidance who do not belong to a traditional church are counseled by AHA members who are "Humanist Counselors AHA." Torcaso holds the title of Counselor, conferred by the Division of Humanist Counseling, a subordinate branch of AHA.

In November of 1988, Torcaso applied to the Circuit Court of Prince William County, Virginia, for authorization to perform wedding ceremonies pursuant to § 20-30 of the Code of Virginia. This statute provides that a minister of any religious denomination will be authorized to perform marriages upon proof of ordination. His application was denied because Torcaso failed to establish that he was an ordained minister as required by the statute.

Torcaso challenges the Virginia statute as violative of the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Virginia Code § 20-23 does not impermissible discriminate between religious and secular wedding officiants. The Code section survives attack under the three-prong test developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Commonwealth has a legitimate interest in regulating the institution of marriage. That interest entitles the Commonwealth to require that those individuals who celebrate marriages be accountable for their actions. Accordingly, it is not unreasonable to require that any one authorized to celebrate marriages give bond in the penalty of $500 with surety. Virginia law requires such a bond of persons who are not ministers of religious denominations (§ 20-25) and by persons who are members of religious societies having no ordained ministers (§ 20-26). Ordained ministers are exempt form the bond requirement simply because Virginia recognizes that the fact of ordination creates a presumption that the officiant is trustworthy and responsible. This statutory exemption, having a valid secular purpose, does not violate the Establishment Clause of the First Amendment, nor does it interfere with one's free exercise of religious beliefs.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Virginia Code § 20-23 Does Not Violate the Establishment Clause of the First Amendment

Virginia Code § 20-23 states that when a minister produces proof of ordination by his congregation, the clerk of the court may authorize him to celebrate the rites of matrimony without posting a bond. Section 20-25 permits persons other than ministers of religious organizations to perform marriages upon the filing of a $500 bond with surety. Similarly, § 20-26 of the Virginia Code allows marriages to be celebrated by a member of a religious order that has no minister upon the filing of a $500 surety bond.

The Supreme Court developed a three-prong test to determine if a law withstands an Establishment Clause challenge in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Applying the *Lemon* analysis, Torcaso's challenge fails.

The initial inquiry in a *Lemon* analysis is whether the challenged legislation has a secular purpose. There is no constitutional violation if the state's purpose is not to promote religion. This Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), recognized that marriage involves interests of basic importance in our society and that the states have a valid interest in regulating the institution of marriage. The Virginia laws governing the appointment of those who may celebrate marriage further its legitimate and secular interest of ensuring that marriages are properly celebrated and recorded.

Virginia has chosen to further its interest in the institution of marriage by requiring that an individual who wishes to officiate a marriage ceremony either be an ordained minister of a religious organization or post a $500 bond. The Virginia Supreme Court has held that the exemption from bonding provided by § 20-23 for ordained ministers simply recognizes that these individuals are presumptively responsible and, therefore, do not need to be bonded. *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E.2d 911, *cert. denied*, 419 U.S. 875 (1974).

The statutory scheme of § 20-23, § 20-25 and § 20-26 furthers Virginia's legitimate concern that responsible individuals perform marriages, regardless of their religion. That these statutes exempt those selected as leaders of religious denominations from bonding, but imposes a

bond requirement on all others, *including members of religious societies having no ordained minister,* demonstrates the secular purpose of the statutes.

An ordained minister is a person selected in accord with the ritual, bylaws or discipline of a society. He is set apart from the rest of the membership by his position. *In Re Application of Ginsburg,* 236 Va. 165, 372 S.E.2d 387 (1988). Ministers are presumptively individuals of integrity by virtue of their selection to that position of authority.

There is no discriminatory intent in the statute to advance one organization's minister ahead of another. It is a purely secular intent to be certain that the wedding ceremony will be performed by a responsible individual. Proof of ordination as a religious minister *or* the posting of a $500 bond is all the Commonwealth requires. No inquiry is made into religious beliefs.

The second prong of the *Lemon* test is the effect test: the primary effect of the legislation must neither promote nor inhibit religion. The Virginia laws neither promote nor inhibit any religion. The Virginia Supreme Court has construed § 20-23 as not having the purpose or effect of preferring one religious sect over another. *Crammer* at 566, 202 S.E.2d at 915. The question to be asked is whether, regardless of the government's's actual purpose, the challenged statute conveys a message of endorsement or rejection. The application of § 20-23 negates any discriminatory effect. The statute does not use the terms "ordination" and "communion" in the ecclesiastical sense

because the state has no concern with the religious aspect of the ceremony. The Virginia Supreme Court has suggested that "ordained" as used in the statute means "appointed" and "communion" means "mutual participation." *Ginsburg* at 167, 372 S.E.2d at 389. Also, "minister" is used in the sense of one who is set apart from the membership as a leader. *Id.*

The exemption from bond under § 20-23 neither promotes nor impedes any religion because the certification requirement is imposed on all ministers. The bonding requirement is not waived for religious societies which do not ordain (i.e., select as a responsible leader) a minister. The statute satisfies the second prong of the *Lemon* test because its effect is not to promote or inhibit religion.

The third consideration in a *Lemon* analysis is whether the legislation fosters excessive government entanglement with religion. Again, the statute withstands the challenge. It is impossible for government to govern without some minimal involvement with religion. It is permissible for government policies with secular objectives to incidentally benefit religion. *Texas Monthly, Inc. v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989). Government regulation must reflect "benevolent neutrality" towards religious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). The Virginia statutory scheme reflects benevolent neutrality to religion while avoiding any unnecessary inquiry into religious beliefs. The Code only asks for "proof of ordination" and of "being in regular communion" with the religious society of which the applicant is

a member to establish that the individual is respected by his congregation.

2. Virginia Code § 20-23 Does Not Violate the Free Exercise Clause of the First Amendment

Petitioner's claim of a violation of the Free Exercise Clause also fails. The First Amendment prohibits the enactment of laws that interfere with an individual's free exercise of religion. The Virginia laws do not interfere with the free exercise of religion; they merely require that any individual who wishes to perform marriage must be accountable for his actions. The statutes do not require petitioner to affirm or deny any religious beliefs. *Compare Torcaso v. Watkins,* 367 U.S. 488 (1961). Anyone seeking to celebrate marriage has only to furnish proof that he is in a leadership position in his organization or post a $500 bond. These requirements do not interfere with an individual's free exercise of his religious belief.

CONCLUSION

Petitioner's application to perform marriages in Virginia was properly denied because he did not meet the qualifications of Virginia law. The denial is not a violation of either the Establishment Clause or the Free Exercise Clause because the statutory requirements serve a valid legislative purpose of insuring that the memorializing and recording of marriage ceremonies is performed by responsible individuals.

The Commonwealth has a legitimate interest in the performance of valid marriages. The code provision protects that interest. Accordingly, the Commonwealth asks that the petition be denied.

Respectfully submitted,

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REPLY BRIEF

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PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Commonwealth of Virginia's brief in opposition not only misstates the provisions of the statutes that are challenged, but also defends those laws in terms that clearly reveal Virginia's preferential treatment of traditionally "religious" wedding celebrants. There are three respects in which Virginia's brief confirms that a writ of certiorari should be granted.

First, the centerpiece of the Commonwealth's argument for denying the writ is the assertion that Virginia merely imposes a $500 surety bond requirement upon wedding officiants who are not ordained ministers. (Opp. 2-3.) This contention is mistaken. Virginia law denied petitioner (and other humanists) the opportunity to have petitioner celebrate

weddings in the Commonwealth *under any circumstances.* He is unable to post a $500 bond and qualify under Section 20-25 of the Virginia Code because he is not a Virginia resident.[1] Nor can the American Humanist Association ("AHA") file such a bond for its members because it is not a "religious society" qualifying under Section 20-26 of the Virginia Code. By contrast, Section 20-23 of the Virginia Code enables ordained religious ministers to celebrate weddings without posting bond and without regard to their residency.

Second, Virginia's brief in opposition confesses the very preference for religious over non-religious affiliations that this Court's decisions forbid. The Commonwealth asserts that "ordination creates a presumption that the officiant is trustworthy and responsible" (Opp. 2) and that "[m]inisters are presumptively individuals of integrity by virtue of their selection to that position of authority" (Opp. 4). Only a prejudice against non-religious wedding celebrants can explain why Virginia does not likewise presume the trustworthiness and integrity of petitioner, who is an accredited Humanist Counsellor—the AHA's counterpart of an ordained clergyman.

Third, the Commonwealth's passing references to the three-part test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), similarly betray a misunderstanding of the pro-religious discrimination at issue. We agree that the Commonwealth may justifiably require that "responsible individual[s]" perform wedding ceremonies, but Virginia has impermissibly pursued that otherwise legitimate secular purpose by presuming that religious ministers can—but that Humanist Counsellors such as petitioner cannot—be a "responsible individual." (Opp. 4.) That being so, it is hard to credit the Commonwealth's assertion that the "challenged statute [does not] convey a

[1] Section 20-25 requires that the wedding celebrant be a resident of a "county or city" in which the wedding is to be performed.

message of endorsement or rejection." *(Id.)* And it is most certainly an undesirable government entanglement with religion for Virginia to seize upon religious affiliation as a test for determining what persons and organizations are sufficiently trustworthy and responsible to celebrate weddings.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, issue a writ of certiorari, and reverse the decision below.

Respectfully submitted,

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